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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
1/14/2019
DEANA WILLIAMSON, CLERK

VITH LOCH, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Harris County
No. 01-16-00438-CR

* * * * *

STATE PROSECUTING ATTORNEY'S MERITS BRIEF

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Vith Loch.

* The trial Judge was the Honorable Michael McSpadden, 209th Judicial District Court.

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No. PD-0894-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

VITH LOCH, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Harris County
No. 01-16-00438-CR

* * * * *

STATE PROSECUTING ATTORNEY'S MERITS BRIEF

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

TEX. CODE CRIM. PROC. art. 26.13(a)(4) requires the trial court to admonish a defendant that his guilty plea "may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law[.]" Appellant, a foreign national, did not receive this admonishment. But he was not harmed: he was already removable due to his prior convictions, evidence that he was

guilty of murder was overwhelming, and his trial strategy was to convince the jury to grant him leniency because a sense of duty and religion motivated him to plead guilty.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

STATEMENT OF THE CASE

Appellant, a citizen of Cambodia, 1 CR 9, pleaded guilty to murder but was not admonished by the trial court of the immigration consequences of his plea as required by Article 26.13(a)(4). 1 CR 144. A jury sentenced him to life imprisonment and imposed a $10,000 fine. 1 CR 144. The court of appeals reversed his conviction, holding that the failure to admonish was harmful under TEX. R. APP. P. 44.2(b), and remanded the case to the trial court. *Loch v. State*, No. 01-16-00438-CR, 2018 WL 3625190 (Tex. App.—Houston [1st Dist.] July 31, 2018) (not designated for publication).

ISSUES PRESENTED

1. **Is the failure to admonish about immigration consequences under TEX. CODE CRIM. PROC. art. 26.13(a)(4) harmful when the defendant was already deportable at the time of his guilty plea due to prior convictions?**

2. **Is the failure to admonish about immigration consequences under TEX. CODE CRIM. PROC. art. 26.13(a)(4) harmful when the defendant knew he was already deportable at the time of his guilty plea due to prior convictions?**

3. **Was the failure to admonish about immigration consequences under TEX. CODE CRIM. PROC. art. 26.13(a)(4) harmful when Appellant was already deportable, the evidence of guilt was overwhelming, and he was morally motivated to plead guilty?**

SUMMARY OF THE ARGUMENT

The Country's first restrictive immigration statute, enacted shortly after the Civil War, barred convicts from admission. Weissbrod, Davis, S. et al., *Immigration Law and Procedure in a Nutshell*, at 5-6 (7th ed. 2017). Such grounds for deportation and prohibitions on admission remain in effect. At the time of Appellant's guilty plea, these laws applied to him and, as a result, his prior convictions made him eligible for removal. Therefore, Appellant's decision to plead guilty was not, and could not have been, affected by any removal consequences. With his status previously fixed, the trial court's failure to admonish him as required by Article 26.13(a)(4) was harmless.

Additionally, the error was harmless because Appellant decided to plead guilty for reasons unrelated to his immigration status. Evidence of guilt was overwhelming, so Appellant's strategy was to plead guilty and seek reduced

punishment from a jury. In mitigation, Appellant showed that he wanted to give the victim's family closure and that he was a better person since devoting his life to Christ.

FACTS

In April 2015, Appellant was charged with murder. 1 CR 7. When he appeared before a magistrate, Appellant said that he was not a U.S. citizen and requested that the Cambodian consulate be notified. 1 CR 9; 7 RR State's Exhibit 27 at 6 (designating birthplace as Asia).

In May 2016, Appellant pleaded guilty to murdering the victim in 2004. 1 CR 144; 5 RR 9-11. He was not, however, admonished that his plea may result in his removal. *See* TEX. CODE CRIM. PROC. art. 26.13(a)(4).

When pleading guilty, Appellant stipulated to six prior convictions:

Felony Aggravated Assault with a Deadly Weapon, March 1990, Texas, ten years' imprisonment.
Felony Burglary of a Habitation, March 1990, Texas, twenty years' imprisonment.
Misdemeanor Possession of Marijuana, February 1996, Texas.
Second-Degree Felony Flight with Disregard for Safety to Persons, January 2005, Florida, two years, two months, eight days' imprisonment.
Misdemeanor False Name or Identity to Police, January 2005, Florida, two months and thirteen days' imprisonment.
Third-Degree Felony Neglect of Child, January 2005, Florida, two years, two months, eight days' imprisonment.

5 RR 9-11; 7 RR State's Exhibits 26, 27.

A jury sentenced him to life imprisonment and imposed a $10,000 fine. 6 RR 58-59.

On appeal, Appellant challenged the voluntariness of his guilty plea based on the trial court's failure to admonish him under Article 26.13(a)(4). *Loch*, 2018 WL 3625190, at *2. Conceding that the trial court erred, the State argued that Appellant was not harmed because, presumably, he would have been admonished of such consequences when he pleaded guilty to the prior felonies.[11] *Id*. at *3. The court of appeals disagreed, stating that there was no evidence in the record that Appellant had been admonished or otherwise made aware of any possible consequences. *Id*. Lastly, though the court acknowledged that the evidence of guilt "unquestionably favors the State," it opined that it makes no difference because there is no evidence that Appellant knew about deportation consequences. *Id*.

[1] Article 26.13(a)(4) does not apply to misdemeanor cases. *State v. Guerrero*, 400 S.W.3d 576 (Tex. Crim. App. 2013).

ARGUMENT

1. Standard of Review

For purposes of TEX. R. APP. P. 44.2(b), harm for the failure to admonish under Article 26.13(a)(4) is assessed according to the following standard: "Considering the record as a whole, do[es the court] have a fair assurance that the defendant's decision to plead guilty would not have changed had the court admonished him?" *VanNortrick v. State*, 227 S.W.3d 706, 709 (Tex. Crim. App. 2007). In doing so, the strength of the evidence is considered in determining whether the failure to admonish influenced the guilty plea. *Id*. at 712.

A. Appellant was already removable, so the possibility of deportation or inadmissibility could not have affected his decision to plead guilty.

This Court can have "fair assurance" that Appellant would have pleaded guilty because he already faced the possibility of removal—*i.e.*, deportation or inadmissibility—before entering his plea. The Article 26.13(a)(4) admonishment was immaterial.

i. Appellant was (and still is) a foreign national.

First, Appellant requested that the Cambodian consular be notified when he appeared before the magistrate. 1 CR 9. This was an affirmative admission that he was a Cambodian national. According to the Vienna Convention, consular assistance is only available when a foreign national has been arrested or is in the custody of a receiving country bound by the Convention. *See* Vienna Convention

on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified by the U.S. on Nov. 24, 1969); *Ex parte Medellin*, 223 S.W.3d 315, 327 (Tex. Crim. App. 2006), *aff'd sub nom. Medellin v. Texas*, 552 U.S. 491 (2008) (the Vienna Convention "'promotes the effective delivery of consular services in foreign countries, including access to consular assistance when a citizen of one country is arrested, committed to prison or custody pending trial, or detained in any other manner in another country.'").

Additionally, according to Appellant's Florida prison records, 5 RR 165-66 (guilty-plea stipulations), in December 2005, ICE-Miami issued a detainer. 7 RR State's Exhibit 27 at 7 (12/20/05 Detain ICE-Miami A#025-391-301). The detainer "serve[d] to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and *removing* the alien." 8 C.F.R. § 287.7 (emphasis added).

ii. Appellant was removable as a matter of law before his guilty plea.

By federal law, specific prior convictions, alone or in combination, make foreign nationals removable. Grounds for removal include two types of procedures: deportation or inadmissibility. *See Vartelas v. Holder*, 566 U.S. 257, 262 (2012) ("In IIRIRA [Illegal Immigration Reform and Immigrant Responsibility Act], Congress abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as 'removal.'"). Deportation

applies to persons who were lawfully admitted into the U.S. under some type of status, as an immigrant or nonimmigrant. Kramer, Mary E., *Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants*, American Immigration Lawyers Association, at 116-17 (7th ed. 2017). Inadmissibility applies, among other things, to persons entering the U.S. or those already in the U.S. who seek to improve their status, including those who entered illegally (*i.e.* evaded formal inspection). *Id*. at 117.

Regardless of Appellant's exact legal status in the U.S. at the time of his guilty plea, as a Cambodian national, he was removable because of his prior convictions. While the same past criminal conduct can provide both grounds for deportability and inadmissibility, *id*. at 117-18, that is not always the case because separate provisions govern each. *See, generally*, 8 U.S.C. §§ 1227 (governing deportable aliens), 1182 (governing inadmissible aliens). Appellant's prior convictions made him removable under both, sometimes for overlapping or different reasons. Additionally, Appellant's priors provide multiple grounds for deportation and inadmissibility. Appellant faced deportation because he had two "aggravated felony" convictions, convictions for crimes involving "moral turpitude," and a conviction for child neglect. He was inadmissible because he had convictions for crimes involving "moral turpitude" as well as multiple convictions. And, as explained in detail below, due to applicable law governing waiver of removal law

and cancellation of removal, Appellant's removable status could not have changed from the last known active date of the detainer in December 2015 until the date he pleaded guilty (May 2016).

a. Appellant was deportable.

i. "Aggravated" Felonies.

Appellant's prior "aggravated felony" convictions for aggravated assault with a deadly weapon and burglary of a habitation would have made him deportable. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). The category "aggravated felony" was added in 1988, *see I.N.S. v. St. Cyr*, 533 U.S. 289, 295 (2001), and applies retroactively through the IIRIRA. *See Ledezma v. Holder*, 636 F.3d 1059, 1065 (9th Cir. 2010) (amended op.) ("aggravated felony" provision is retroactive except for convictions entered before November 18, 1988); Kramer, Mary E., *Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants*, American Immigration Lawyers Association, at 341.

Offense[2]	**Authority**
Assault in 1987: TEX. PENAL CODE § 22.01(2) (*intentionally and knowingly* threatens imminent bodily injury).[3] Aggravated Assault with a Deadly Weapon in 1987: TEX. PENAL CODE § 22.02(a)(2) ("threatens with a deadly weapon") or (a)(4) ("uses a deadly weapon").	8 U.S.C. § 1101(43)(F) (included in the definition of "aggravated felony" is a "crime of violence," against a person—for which the terms of imprisonment is at least one year—defined in 18 U.S.C. § 16(a): "an offense that has as an element the use, attempted use, or *threatened use of physical force* against the person or property of another");[4] *Calvillo Garcia v. Sessions*, 870 F.3d 341, 343 (5th Cir. 2017) (aggravated assault under § 22.02(a)(2) is an aggravated felony for § 1101(a)(43)(F)).[5]
Burglary of a Habitation; 20 years' confinement	8 U.S.C. § 1101(a)(43)(G) ("aggravated felony" includes burglary with a term of imprisonment for at least one year).

[2] The offense was committed in April 1989. 5 RR 10.

[3] 7 RR State's Exhibit 27 at 16.

[4] To determine whether a prior conviction qualifies, the Supreme Court has directed courts to "employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

[5] *But see U.S. v. Perez-de Leon*, __ Fed. Appx.__, 2018 WL 6118685 (5th Cir. Nov. 29, 2018) (noting that whether Texas' aggravated assault statute is an aggravated felony is unsettled); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018) (18 U.S.C. § 16(b)'s residual clause—"any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"—is unconstitutionally vague), *overruling Begay v. U.S.*, 553 U.S. 137 (2008) (requiring intentional and knowing, not reckless, conduct for § 16(b)).

Though the IIRIRA "prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case," *Moncrieffe*, 569 U.S. at 187, Appellant was nevertheless eligible for a waiver of removal because his convictions were entered in March 1990. For convictions before November 29, 1990, a lawful permanent resident for seven consecutive years is eligible for a "§ 212(a)" discretionary waiver of removal from the Attorney General. *St. Cyr*, 533 U.S. at 326 (because of the prohibition against retroactivity, the IIRIRA, effective April 1, 1997, did not eliminate § 212(a) the waiver provision in effect before its effective date); *Matter of Abdelghany*, 26 I. & N. Dec. 254, 268-69 (BIA 2014) (§ 212(a) waiver applies to convictions arising from both guilty pleas and trials by jury or judge); Scharf, Irene, et al., *The Waivers Book: Advanced Issues in Immigration Law Practice*, at 64-65 (2nd ed. 2017) (discussing the history of § 212(a)). The SPA previously stated that Appellant was ineligible for the waiver. *See* SPA's PDR at 7 n.2. However, after a closer look at the effective date of the 1990 Immigration Act, the SPA has determined it is applicable. Section 212(a)'s discretionary nature means Appellant was deportable unless and until he was granted a formal reprieve. Regardless, Appellant likely received no such waiver before his plea because he had an ICE detainer in 2005 and, as explained below, his 2005 conviction for child neglect made him deportable and absolutely ineligible for cancellation under IIRIRA.

ii. Crimes involving "moral turpitude."

Additionally, Appellant would have been deportable for having two or more convictions for crimes involving moral turpitude.[6] 8 U.S.C. § 1227(a)(2)(A)(ii) (deportation for convictions of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct[7]).

Prior Convictions Involving Moral Turpitude[8]
Aggravated Assault with a Deadly Weapon. *Munoz v. Holder*, 755 F.3d 366, 370 (5th Cir. 2014) (2010 Texas aggravated assault conviction qualifies as a crime involving moral turpitude); *Calderon-Dominguez v. Mukasey*, 261 Fed. Appx. 671, 673 (5th Cir. 2008) (unpublished) (intentional assault against spouse under TEX. PENAL CODE § 22.01 is a crime of moral turpitude); *see also Trippell v. State*, 535 S.W.3d 178, 180 (Tex. Crim. App. 1976) (aggravated assault on a female is a crime involving moral turpitude).
Burglary of a Habitation. *See Cana-Coronado v. Holder*, 547 Fed. Appx. 463 (5th Cir. 2013) (per curiam) (burglary of a habitation in the Texas Penal Code is a crime of moral turpitude); *Pulido-Alatorre v. Holder*, 381 Fed. Appx. 355, 358 (5th Cir. 2010) (unpublished) (burglary of a vehicle is a crime of moral turpitude).
Second-Degree-Felony Flight with Disregard for Safety to Persons, under FLA. STAT. § 316.1935(1)-(3)(a), *last amended* July 1, 2004. *See Gelin v. U.S. Attorney General*, 837 F.3d 1236, 1241 (11th Cir. 2016) (resisting an officer with violence is a crime of moral turpitude); *Ruiz Lopez v. Holder*, 682 F.3d 513, 521 (6th Cir. 2012) (intentional evading with a vehicle is a crime of moral turpitude); *Pulido–Alatorre*, 381 Fed. Appx. at 359 (same).

[6] The statutory authorized waiver for a pardon does not apply here. 8 U.S.C. § 1227(a)(2)(A)(vi).

[7] Appellant's 2005 Florida offenses involved a single scheme of conduct, so they cannot be combined alone for the purposes of two or more crimes involving moral turpitude. 7 RR 54 (State's Exhibit 29).

[8] *Jordan v. De George*, 341 U.S. 223, 232 (1951) (moral turpitude is not vague).

Third-Degree-Felony Neglect of Child, under FLA. STAT. § 827.03(1)(e), (2)(d). *Cf. Keungne v. U.S. Attorney General*, 561 F.3d 1281, 1287 (11th Cir. 2009) (even criminally reckless conduct is moral turpitude).

The two convictions committed in 2005, after the effective date of the IIRIRA, would have made him completely ineligible for cancellation of removal.[9] 8 U.S.C. § 1229b(b)(1)(C) (offense under § 1182(a)(2) include crimes of moral turpitude), *according Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (there is no temporal (within ten-year) limitation under 8 U.S.C. § 1229b(b)(1)(C) for "a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I).").[10]

iii. Crime of child neglect.

Finally, Appellant's conviction for child neglect—apart from also being a crime of moral turpitude—would have also made him deportable and ineligible for cancellation of removal by the Attorney General. 8 U.S.C. § 1229b(b)(1)(C) (may not cancel removal of persons convicted of an offense under 8 U.S.C. § 1227(a)(2), which includes child neglect under § 1227(a)(2)(E)(i)).

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[9] As explained above, for his convictions before the IIRIRA, Appellant was eligible for a § 212(c) waiver from the Attorney General.

[10] Until ten years after his felony convictions in 2005, which was shortly before his plea in this case, those convictions would have made him doubly ineligible for cancellation of removal. 8 U.S.C. § 1229b(b)(1)(B) (good "moral character" for ten years).

Florida	Authority
Third-Degree-Felony Child Neglect under FLA. STAT. § 827.03(1)(e), (2)(d).	*Martinez v. U.S. Atty. Gen.*, 413 Fed. Appx. 163, 167 (11th Cir. 2011) (conviction for child neglect under Florida law qualifies as a "crime of child abuse" to preclude cancellation of removal).

iv. Inapplicable doctrines.

Finally, because the extent of Appellant's continuous residency in the U.S. before his plea is unknown, the application of the *Fleuti* doctrine,[11] which applies to lawful permanent residents with pre-April 1, 1997, convictions who make brief excursions outside the U.S., is not an issue. *See, generally, Vartelas v. Holder*, 566 U.S. 257, 260-76 (2012) (discussing the *Fleuti* doctrine). Even if the *Fleuti* doctrine came into play, Appellant's status as a lawful permanent resident would only affect the type of removal procedures he would face upon reentry—deportation instead of inadmissibility. *See* Kramer, Mary E., *Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants*, American Immigration Lawyers Association, at 111-13.

Next, because the length of Appellant's U.S. residency, if lawful at any point, is not known, the time-stop rule that applies to the continuous seven years of lawful residency qualification for eligibility to receive cancellation of removal is not an

[11] *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

issue. *See, generally, Calix v. Lynch*, 784 F.3d 1000, 1002-12 (5th Cir. 2015) (explaining the operation of the time-stop rule). Thus, no argument can be made that Appellant was also ineligible for cancellation of removal (apart from the prior convictions) for not meeting the seven-year residency requirement.

b. Appellant was inadmissible.

i. Crimes involving "moral turpitude" and multiple convictions.

Appellant[12] was also inadmissible because of his prior convictions.[13] First, Appellant's convictions for aggravated assault with a deadly weapon, burglary of a habitation, felony flight with disregard for safety of persons, and child neglect made him inadmissible under the provisions governing crimes of moral turpitude[14] and multiple convictions. 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1182(a)(2)(B). These priors would also have disqualified him from cancellation of removal. 8 U.S.C. §

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[12] Appellant was never eligible for Temporary Protected Status because Cambodia has never been included on the eligible list of countries. *See* https://www.uscis.gov/humanitarian/temporary-protected-status. He was also ineligible because he had prior felony convictions. *See* 8 U.S.C. § 1254a(c)(2)(B)(I) (no eligibility for alien convicted of any felony); *Ex parte Aguilar*, 537 S.W.3d 122, 126 (Tex. Crim. App. 2017).

[13] Note that an "aggravated felony" conviction does not affect admissibility, only deportation. Therefore, the § 212(c) waiver discussed above is inapplicable.

[14] The statutory exceptions for crimes committed when the offender was under 18 and the maximum possible sentence did not exceed one year, and the actual sentence did not exceed six months do not apply here. 8 U.S.C. § 1182(a)(2)(A)(ii).

1229b(b)(1)(C) (prior offense under 1182(a)(2)).

ii. Pre-existing removability makes the lack of admonishment harmless.

It can reasonably be inferred that Appellant knew he was subject to removal before his plea. Appellant acknowledged he was not a U.S. citizen when he invoked the assistance of the Cambodian consular. And according to Appellant's stipulations when pleading guilty, he was aware that an ICE detainer had been issued when he was a prisoner in Florida. 5 RR 165-66; 7 RR State's Exhibit 27 at 7. Because of his criminal history, his status could not have changed. Therefore, Appellant already knew he "may" be deported, excluded, or denied naturalization at any time in the future. *See* TEX. CODE CRIM. PROC. art. 26.13(a)(4).

Alternatively, even if Appellant was not aware of his actual status, the reality is that the admonishment—that he "may" suffer immigration consequences—was inconsequential. Because he had no lawful right to remain in the U.S., he is not entitled to complain on appeal that his guilty plea to murder may lead to his removal. His status could never have been altered by his guilty plea. Therefore, even if Appellant subjectively believed his immigration status was not already removable, it still cannot be said that the lack of admonishment was harmful. A removable defendant's false belief about immigration status does not implicate a "substantial

right" as required by Rule 44.2(b).[15] *See VanNortrick*, 227 S.W.3d at 712 (applying "fair assurance" test to the "substantial rights" standard). Contrary to the court of appeals' determination, it is certain that Appellant would not have taken his chances at trial, believing it to be the only way to avoid removal. *Loch*, 2018 WL 3625190, at *3. In hindsight, for purposes of a harm assessment, if it *could* have had no impact on his decision then, it cannot rationally be said that it *would* have had an impact.[16] The absurdity of finding harm under these circumstances is clear when the practicality resulting from the remedy is considered. If Appellant were granted a new trial, his unaltered removable status would make the actual giving of the

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[15] The distinction between a constitutional claim and a statutory-based claim is important. Though *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969), requires the record to show that a guilty plea was knowing and voluntary, it "clearly did not hold that due process requires the equivalent of the Article 26.13(a) admonishments;" therefore, any statutory claim is separate from a claimed violation of due process and is subject to a non-constitutional harm analysis. *Davison v. State*, 405 S.W.3d 682, 686-88 (Tex. Crim. App. 2013).

[16] *Cf. Ex parte Velasquez-Hernandez*, No. WR-80,325-01, 2014 WL 5472468, at *4 (Tex. Crim. App. Oct. 15, 2014) (not designated for publication) ("Applicant's attorney may have given him incorrect advice as to a possible cancellation of removal, but based on the evidence we have in the record, applicant is ineligible for cancellation of his removal proceedings for reasons unrelated to his trial counsel's possibly deficient performance: he is in the country illegally, and removal proceedings had begun before his indictment on the charged offense. In such circumstances, any ineffective assistance of counsel that might have occurred cannot be blamed for appellant's deportation. ").

admonishment meaningless because he has nothing more to lose or sacrifice. There is no justification for a do-over when the result would be the same.

iii. Appellant was similarly situated to an undocumented immigrant who was always removable or a U.S. citizen who will never be removable.

Because Appellant was removable at the time he pleaded guilty, his status is analogous to the appellee in *State v. Guerrero* and the appellant in *Cain v. State*. 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013); 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). In *Guerrero*, Guerrero claimed that his guilty plea was involuntary because his trial attorney failed to admonish him about deportation consequences. *Id*. This Court observed that "the prospect of removal . . . could not reasonably have affected" Guerrero's decision to plead guilty because, as an undocumented immigrant, he was "deportable for that reason alone[.]" *Id*. at 588-59. "Had [Guerrero] gone to trial with counsel and been acquitted he would not have been transformed into a legal resident." *Id*. at 589.

In *Cain*, Cain claimed that the trial court reversibly erred by failing to admonish him under Article 26.13(a)(4). 947 S.W.3d at 263. This Court held that the error was harmless because the record showed that he was a U.S. citizen and therefore not subject to deportation. *Id*. at 264.

Appellant, like Guerrro and Cain, experienced absolutely no change in his immigration status as a result of his guilty plea.[17] Had Appellant never been charged or gone to trial and been acquitted, he would not have been transformed into a non-removable alien.[18] Harm cannot be shown on this record.

iv. Neither VanNortrick v. State or Carranza v. State are controlling.

To the extent that *VanNortrick v. State* may support the proposition that the error was harmful, it should be distinguished or disavowed. 227 S.W.3d at 714. There, the State argued that the inference of U.S. citizenship precluded a finding of harm. *Id*. at 710. According to the State, VanNortrick's prior Michigan felony

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[17] *See also Ex parte Velasquez-Hernandez*, No. WR-80,325-01, 2014 WL 5472468, at *4 (Tex. Crim. App. Oct. 15, 2014) (not designated for publication) ("Applicant's attorney may have given him incorrect advice as to a possible cancellation of removal, but based on the evidence we have in the record, applicant is ineligible for cancellation of his removal proceedings for reasons unrelated to his trial counsel's possibly deficient performance: he is in the country illegally, and removal proceedings had begun before his indictment on the charged offense.").

[18] *Cf. People v. Haley*, 96 A.D.3d 1168, 1169 (3d Dept. 2012) ("regardless of whether defendant pleaded guilty to the charges in 2002, had been found guilty after trial or had been acquitted, his status as a deportable alien would not have been affected . . . the alleged failure of defendant's counsel to inform him of the immigration consequences of his guilty plea in 2002 did not prejudice defendant in any way."); *People v. Busgith*, 59 Misc. 3d 1212(A) (N.Y. Sup. Ct. 2018) ("Because defendant is still subject to mandatory deportation with respect to convictions that he is not seeking to vacate, it is hard to see how he was prejudiced by any misadvice given with respect to the convictions he is seeking to vacate.").

conviction would have made him deportable had he been a non-U.S. citizen when he pleaded guilty. *Id*. And because he had freely moved to Texas, it strongly suggested that he was a U.S. citizen. *Id*. This Court determined that the prior Michigan conviction did not prove VanNortrick was a U.S. citizen. *Id*. at 71. "There are too many possible scenarios by which a non-citizen who has been convicted of a deportable offense could have escaped the immigration consequences of his conviction." *Id*. Noting that it would be impossible to know whether the admonishment would have changed VanNortrick's decision to plead guilty, the Court held that it had no fair assurance that the error was harmless. *Id*. at 712-13. Elaborating, the Court stated that it could not determine if the Michigan conviction in any way altered his immigration status. *Id*. at 713. But, even if VanNortrick had been aware of the consequences, "would he not [have] be[en] reasonable to believe that, having gone this long without being deported, he would likely never have been deported for that conviction? And that the conviction in the present case presented a renewed risk to his status?" *Id*. at 713-14.

VanNortrick is not controlling here. First, the issue was whether the Michigan prior supported a finding that VanNortrick was a U.S. citizen, thereby rendering any error harmless. There is no question that Appellant is a citizen of Cambodia, so there is no argument that U.S. citizenship defeats a showing of harm.

Second, as shown above, how Appellant's priors impacted his status is ascertainable. It is a matter of statutory law. Therefore, unlike *VanNortrick*, the data is sufficient to assess harm. 227 S.W.3d at 714.

Lastly, VanNortrick's statement that a "renewed risk" of deportation renders the error harmful is *dicta*. The Court's resolution of the case was based on the silent or insufficient record about VanNortrick's citizenship. Whether the prior conviction altered his immigration status was beside the point. But, even if the Court's "renewed risk" discussion carries any weight, it has been significantly undermined by the Court's more recent decision in *Guerrero*. And for good reason. The requisite admonishment warns that a guilty plea "*may* result in deportation, ..." TEX. CODE CRIM. PROC. art. 26.13(a)(4). "May" connotes a possibility, which is contrary to *VanNortrick*'s assumption that it conveys something more definite or imminent. A "renewed risk" is a fiction when there was a pre-existing risk that the defendant "may" be deported.

Next, *Carranza v. State* has been overruled *sub silentio* by *Guerrero*. The Court held that Carranza established that the failure to admonish him was harmful even though he was already subject to deportation because of his illegal status. 980 S.W.2d 653, 658 (Tex. Crim. App. 1998). The Court reasoned that there is a significant difference between an illegal alien with an expired permit and one who committed a crime. *Id*. Specifically, the Court pointed out that the immigration law in effect had waiver provisions for non-criminal deportees and the newly enacted

federal habeas statute did not give federal courts jurisdiction over an order of deportation by the Board of Immigration Appeals. *Id*.

Nevertheless, even if *Carranza* is still good law, this case is different because Appellant already had a criminal history with offenses that rendered him removable long before his plea.

B. Appellant would still have pleaded because it was a strategic choice.

Even if Appellant's priors alone do not fairly assure the Court that he would have pleaded guilty, evidence of Appellant's strategic choice should. There was overwhelming evidence of Appellant's guilt. In addition to his confession to police, Appellant told the mother of two of his children that he had shot and killed the victim and, after the victim's disappearance, he told the victim's then-girlfriend that he was gone. *Loch*, 2018 WL 3625190, at *3 ("This evidence unquestionably favors the State."); 5 RR 109-10 (Appellant's statement after Mario disappeared that he is gone), 153 (Appellant admitted to shooting and killing Mario); State's Exhibit 16 (confession to police). The state of the evidence establishes that Appellant's decision was not affected by the lack of admonishment. *See Motilla v. State*, 78 S.W.3d 352, 356-57 (Tex. Crim. App. 2002) (overwhelming evidence of guilt is factor to consider in harm analysis).

Additionally, Appellant decided to plead guilty even though his counsel informed him that he had filed suppression motions and that there were legitimate

defensive strategies available if he chose to contest his guilt. 2 RR 7-8.

Finally, and most importantly, given the overwhelming evidence of his guilt, the record shows that Appellant decided to focus on punishment. This involved showing personal growth and improvement as evidenced by his acceptance of responsibility to give the victim's family closure after eleven years and devotion "to Christ" since the offense. 5 RR 169-72; *see also* 6 RR 13-14, 17-18, 21, 23, 25-27, 29-32 (accepting responsibility and finding Christ); State's Exhibit 16 (confession made to police to give family closure). "He pled guilty because he believes he's guilty. He says I'm guilty. I did it." 6 RR 14 (defense summation). Appellant's chosen strategy, then, was to present mitigating evidence to persuade the jury to impose a lighter punishment. *See Gardner v. State*, 164 S.W.3d 393, 399 (Tex. Crim. App. 2005) ("The voluntary nature of appellant's guilty plea is further shown in the record by the overwhelming evidence that appellant's guilty plea was part of a strategy . . . to persuade the jury to grant appellant probation."); 6 RR 14 ("The issue of this is not whether he's guilty or not. The issue is what should happen. What should be the appropriate level of punishment."); *see, generally*, 6 RR 13-34 (defense summation). Consistent with that, in closing counsel argued:

> Did he change or was he not changed and you have to make that decision for yourself. And if you think, believe he's changed then you know what we are asking for, something on the low end. And specifically ladies and gentlemen, we are asking for something less than 20, but not more than 20. Because at 20 or less, he'll be between 60 and 65 years old. A 65 year old man who gave his life to Christ is not a threat.

6 RR 31.

The state of the evidence and the dutiful and spiritual motive behind his guilty plea, in combination with his already deportable status, demonstrate that his decision to plead guilty would not have changed had he been properly admonished.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the decision of the court of appeals and remand for the court of appeals to consider Appellant's remaining points of error.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Word's word-count tool, this document contains 5,269 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State Prosecuting Attorney's Merits Brief has been served on January 14, 2019 *via* email or certified electronic service provider to:

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